

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ANTONIO ANDRE COLBERT,

Defendant-Appellant.

UNPUBLISHED

October 15, 2013

No. 310813

Macomb Circuit Court

LC No. 2011-002574-FC

Before: BECKERING, P.J., and O'CONNELL and SHAPIRO, JJ.

PER CURIAM.

Defendant appeals by right from his jury trial convictions for two counts of third-degree criminal sexual conduct (CSC III), MCL 750.520d(1)(a)¹ (person at least 13 and under 16 years of age). The trial court sentenced defendant to 120 to 180 months' imprisonment for each count, with 281 days' jail credit. Because the trial court committed no reversible error, we affirm defendant's convictions and sentences. However, we remand the case to the trial court to correct the presentence investigation report (PSIR) and to send the corrected PSIR to the Department of Corrections.

I. MOTION TO AMEND INFORMATION

First, defendant contends that the trial court abused its discretion in allowing the prosecution to amend the information at trial to add two counts of CSC III.² We disagree.

"Both MCL 767.76 and MCR 6.112(H) authorize a trial court to amend an information before, during, or after trial." *McGee*, 258 Mich App at 686. MCL 767.76 provides, in part:

¹ Amendments to MCL 750.520d became effective on April 1, 2013.

² "A trial court's decision to grant or deny a motion to amend an information is reviewed for an abuse of discretion." *People v McGee*, 258 Mich App 683, 686-687; 672 NW2d 191 (2003). We review de novo the interpretation of statutes and court rules. *Id.* at 686.

“The court may at any time before, during or after the trial amend the indictment in respect to any defect, imperfection or omission in form or substance or of any variance with the evidence.” However, this statute does not apply where the purpose of the amendment is to add a completely different offense. *McGee*, 258 Mich App at 688-689. MCR 6.112(H) provides, in part: “The court before, during, or after trial may permit the prosecutor to amend the information unless the proposed amendment would unfairly surprise or prejudice the defendant.” Any information may be amended to add a new charge as long as it does not result in unfair surprise, inadequate notice, or insufficient opportunity to defend. *McGee*, 258 Mich App at 689-690. “[N]o unfair surprise, inadequate notice, or insufficient opportunity to defend exists when the elements of both the charged offenses and an offense the prosecutor moves to add at the end of the preliminary examination, are shown by testimony.” *Id.* at 691.

In this case, the elements of CSC III were shown by the testimony at the preliminary examination. See *id.* The elements of CSC III are that defendant penetrated the victim’s vagina with his penis for a sexual purpose and that the victim was between the ages of 13 and 16. *People v Hunt*, 442 Mich 359, 364; 501 NW2d 151 (1993); MCL 750.520d(1)(a). The victim testified that she was 14 years old on June 8, 2011, and that defendant put his penis in her vagina twice. Thus, despite defendant’s claims, the amendment did not result in unfair surprise, inadequate notice, or insufficient opportunity to defend. See *McGee*, 258 Mich App at 690. Accordingly, the trial court did not abuse its discretion in granting the motion to amend. See *id.* at 686-687.

II. MCL 768.27a

Next, defendant contends that the trial court abused its discretion in allowing a witness, NB, to testify regarding other sexual acts by defendant.³ We disagree.

Although defendant refers to MRE 404(b), MCL 768.27a is the relevant statute. *People v Watkins*, 491 Mich 450, 475-477; 818 NW2d 296 (2012) (holding that MCL 768.27a supersedes MRE 404(b) in cases in which it applies). MCL 768.27a(1) provides, in part, that “in a criminal case in which the defendant is accused of committing a listed offense against a minor, evidence that the defendant committed another listed offense against a minor is admissible and may be considered for its bearing on any matter to which it is relevant.” MCL 768.27a “allows the admission of other-acts evidence to demonstrate the likelihood of a defendant’s criminal sexual behavior toward other minors.” *Buie*, 298 Mich App at 71 (quotation marks and citation

³ “A trial court’s decision to admit evidence is reviewed for an abuse of discretion. However, ‘[w]hen the decision regarding the admission of evidence involves a preliminary question of law, such as whether a statute or rule of evidence precludes admissibility of the evidence, the issue is reviewed de novo.’” *People v Buie*, 298 Mich App 50, 71; 825 NW2d 361 (2012) (citations omitted).

omitted). However, before admitting the evidence, a trial court must weigh the probative value of the evidence against its prejudicial effect under MRE 403. *Buie*, 298 Mich App at 72.

[W]hen applying MRE 403 to evidence admissible under MCL 768.27a, courts must weigh the propensity inference in favor of the evidence's probative value rather than its prejudicial effect. That is, other-acts evidence admissible under MCL 768.27a may not be excluded under MRE 403 as overly prejudicial merely because it allows a jury to draw a propensity inference. [*Watkins*, 491 Mich at 487.]

However, the trial court may still exclude the evidence based on several considerations. *Id.*

These considerations include (1) the dissimilarity between the other acts and the charged crime, (2) the temporal proximity of the other acts to the charged crime, (3) the infrequency of the other acts, (4) the presence of intervening acts, (5) the lack of reliability of the evidence supporting the occurrence of the other acts, and (6) the lack of need for evidence beyond the complainant's and the defendant's testimony. This list of considerations is meant to be illustrative rather than exhaustive. [*Id.* at 487-488 (footnote with citations omitted).]

Defendant does not dispute that MCL 768.27a applies in this case. Rather, he argues that NB's testimony was not relevant, any probative value was substantially outweighed by the danger of unfair prejudice, and the admission of the evidence forced him to defend a separate Wayne County case and impacted his decision to testify. NB's testimony was relevant to show the likelihood of defendant's criminal sexual behavior toward other minors. See *Buie*, 298 Mich App at 71. It was admissible if it satisfied the balancing test under MRE 403. See *Buie*, 298 Mich App at 72.

The other act was similar to the charged crime in that defendant approached both girls in his white van, the girls were 14 and 15 years old, defendant had sexual intercourse with each twice, and defendant choked or grabbed both of their necks. However, there were also substantial differences between the acts. The sexual intercourse between defendant and NB was initially consensual, defendant and NB went back to defendant's house, and there were other individuals involved in the alleged assault. Contrarily, according to the victim in this case, the sexual intercourse was not consensual, the act took place in defendant's van, and there were no other individuals involved. The act involving NB occurred only one year before the incident in this case. NB testified regarding only one incident, but it involved two sexual penetrations by defendant, as in this case. There is no evidence of any intervening acts. The reliability of NB's testimony was questionable because she did not appear to testify in the case against defendant and she was facing charges for armed robbery. There was a need for evidence beyond the victim's testimony because the victim's credibility was questioned, although defendant did not testify. According to defendant, the evidence affected his decision to testify and forced him to defend the Wayne County case. Also, although there was physical evidence of sexual intercourse between defendant and the victim, that evidence did not show a kidnapping, as required for the first-degree criminal sexual conduct (CSC I) charges. See MCL 750.520b(1)(c).

Finally, we may consider that defendant was not convicted of the other acts. *Watkins*, 491 Mich at 489. Thus, there are considerations that weigh both in favor of and against admission of the other acts evidence. Whether the probative value of the evidence was outweighed by the danger of unfair prejudice is a close question. However, given that it was a close question, the trial court's decision did not constitute an abuse of discretion. See *Buie*, 298 Mich App at 71.

III. MOTION FOR MISTRIAL

Next, defendant contends that the trial court erred by denying his motion for a mistrial after the prosecution displayed in front of the jury photographs that were previously excluded as unfairly prejudicial.⁴ We disagree.

“A trial court should grant a mistrial only for an irregularity that is prejudicial to the rights of the defendant and impairs his ability to get a fair trial.” *People v Schaw*, 288 Mich App 231, 236; 791 NW2d 743 (2010) (quotation marks and citation omitted). During trial, defendant objected to the admission of a photograph of cards titled, “Steamy Sex Games,” which were found in a backpack in defendant's vehicle. The front of the cards read, “118 exotic cards equals lots of hot scenarios and all sorts of naughty things to do with your lover.” Defendant argued that the photograph was not the best evidence, it was more prejudicial than probative, and there was no evidence that the cards were with him during the alleged incident. The prosecution argued that the backpack was present at the time of the incident and the photograph showed that defendant was a sexual perpetrator. The prosecution also argued that the best evidence rule did not apply. The trial court excluded the evidence because it did not prove any element and was more prejudicial than probative. Subsequently, defendant argued that the photograph, which was previously excluded, was shown to the jury. Defendant did not object at the time the photograph was shown because he did not want to draw more attention to it, but objected outside the presence of the jury. The prosecution admitted that the photograph was shown briefly. Defendant requested a mistrial. The prosecution argued that the trial court should give a curative instruction. The trial court denied defendant's motion for a mistrial, but ruled that it would give a curative instruction.

We agree with the trial court's ruling excluding the photograph because it was not relevant to proving any element and was prejudicial given the charges against defendant. Thus, the showing of the excluded photograph to the jury constituted an irregularity. *Id.* However, based on a review of the record, defendant was not prejudiced or denied a fair trial. See *id.* According to the prosecutor, the display was brief. The trial court judge indicated that she did not even see the photograph. Moreover, there was overwhelming evidence of CSC III based on

⁴ “We review for an abuse of discretion a trial court's decision regarding a motion for a mistrial. This Court will find an abuse of discretion if the trial court chose an outcome that is outside the range of principled outcomes.” *Schaw*, 288 Mich App at 236 (citation omitted).

the victim's testimony and the DNA results. Thus, the trial court's decision to deny the motion for a mistrial was within the range of principled outcomes.⁵ See *id.*

IV. JURY INSTRUCTIONS

Next, defendant contends that the trial court's instruction that the jury could consider the two counts of CSC I, the count of kidnapping, and the two counts of CSC III as separate crimes was erroneous, misleading, and denied him a fair trial. We disagree.

This Court reviews jury instructions in their entirety to determine whether the trial court committed error requiring reversal. Jury instructions must include all the elements of the charged offense and must not exclude material issues, defenses, and theories if the evidence supports them. Even if somewhat imperfect, instructions do not create error if they fairly presented the issues for trial and sufficiently protected the defendant's rights. [*People v Canales*, 243 Mich App 571, 574; 624 NW2d 439 (2000) (citations omitted).]

Defendant argues that it was error requiring reversal for the trial court to instruct the jury that it could consider the counts of CSC III as separate and additional charges, rather than as alternative charges. The trial court instructed the jury as follows:

The defendant is charged with five separate counts, that is with the crimes of criminal sexual conduct first degree, criminal sexual conduct first degree, kidnapping and criminal sexual conduct third degree and criminal sexual conduct third degree. These are separate crimes and the prosecutor is charging that defendant committed all of them. You must consider each crime separately in light of all of the evidence in this case.

You may find the defendant guilty of all or any one or any combination of these crimes or not guilty.

This Court has found that CSC I and CSC III are separate offenses for which a defendant may be properly convicted and sentenced because each contains an element that the other does not. *People v Garland*, 286 Mich App 1, 6; 777 NW2d 732 (2009). In *Garland*, the defendant was charged with two acts of sexual penetration. *Id.* at 5. This Court found that the defendant could be charged, tried, and convicted of both CSC I and CSC III for each act. *Id.* at 5-6. Similarly, defendant was properly charged and tried with both CSC I and CSC III for each act of sexual penetration. Thus, the trial court's instruction was not erroneous.

⁵ We note that no curative instruction was given because defendant did not want to draw more attention to the photograph.

Defendant's reliance on *People v Goold*, 241 Mich App 333; 615 NW2d 794 (2000), is misplaced. In *Goold*, this Court found that the district court erred in allowing the prosecution to add CSC III based on affinity as a separate charge, rather than amending the preexisting CSC III charge to include affinity as an alternative to force or coercion. *Id.* at 343. As the Court noted, that case did "not involve prosecution under two separate statutes for the same allegedly criminal conduct[.]" but "involve[d] the *same* alleged criminal conduct, sexual penetration, prosecuted under the *same* statute, MCL 750.520d; MSA 28.788(4), with different aggravating elements, affinity between the perpetrator and victim or penetration accomplished with force or coercion." *Goold*, 241 Mich App at 342 (emphasis in original).

V. MOTION FOR NEW TRIAL

Next, defendant contends that the trial court's denial of his motion for a new trial constituted error requiring reversal.⁶ We disagree.

"A trial court may grant a new trial to a criminal defendant on the basis of any ground that would support reversal on appeal or because it believes that the verdict has resulted in a miscarriage of justice." *People v Terrell*, 289 Mich App 553, 559; 797 NW2d 684 (2010) (citation and quotation marks omitted). Defendant argues that the trial court erred in denying his motion for a new trial on three grounds: (1) the trial court's abuse of discretion in allowing the prosecution to amend the information, (2) the trial court's abuse of discretion in allowing NB to testify, and (3) the trial court's erroneous instruction to the jury. As discussed above, none of these grounds support reversal on appeal and, thus, the trial court did not abuse its discretion in denying defendant's motion for a new trial on these bases.

VI. ERRORS IN PSIR

Next, defendant contends that the trial court abused its discretion in not striking certain information from the PSIR and that the PSIR must be corrected to conform to the trial court's rulings.⁷ We agree, in part.

MCL 771.14(6)⁸ provides:

⁶ A trial court's decision to deny a motion for a new trial is reviewed for an abuse of discretion and its factual findings are reviewed for clear error. *People v Gratsch*, 299 Mich App 604, 618; 831 NW2d 462 (2013).

⁷ "The trial court's response to a claim of inaccuracies in the presentence investigation report is reviewed for an abuse of discretion. A court abuses its discretion when it selects an outcome outside the range of reasonable and principled outcomes." *People v Waclawski*, 286 Mich App 634, 689; 780 NW2d 321 (2009) (citations omitted).

⁸ MCL 771.14 was amended on February 23, 2012.

At the time of sentencing, either party may challenge, on the record, the accuracy or relevancy of any information contained in the presentence investigation report. The court may order an adjournment to permit the parties to prepare a challenge or a response to a challenge. If the court finds on the record that the challenged information is inaccurate or irrelevant, that finding shall be made a part of the record, the presentence investigation report shall be amended, and the inaccurate or irrelevant information shall be stricken accordingly before the report is transmitted to the department of corrections.

This Court has stated:

Because the Department of Corrections makes critical decisions concerning a defendant's status on the basis of information contained in the PSIR, the PSIR should accurately reflect any determination the sentencing judge has made regarding the accuracy or relevance of its information. At sentencing, either party may challenge the accuracy or relevancy of any information contained in the presentence report. The information is presumed to be accurate, and the defendant has the burden of going forward with an effective challenge, but upon assertion of a challenge to the factual accuracy of information, a court has a duty to resolve the challenge. When the accuracy of the presentence report is challenged, the trial court must allow the parties to be heard and must make a finding as to the challenge or determine that the finding is unnecessary because the court will not consider it during sentencing.

* * *

Although the Michigan Rules of Evidence do not apply at a sentencing proceeding, the defendant must be afforded an adequate opportunity to rebut any matter he or she believes to be inaccurate. If the court finds that challenged information is inaccurate or irrelevant, that finding must be made part of the record and the information must be corrected or stricken from the report. When a sentencing court disregards information challenged as inaccurate, the court effectively determines that the information is irrelevant and the defendant is entitled to have the information stricken from the report. The failure to strike disregarded information can be harmless error. [*Waclawski*, 286 Mich App at 689-690 (citations omitted).]

Defendant first argues that the trial court abused its discretion in refusing to strike the PSIR author's statement that defendant's failure to use a condom during the incident reflected a careless regard for his own health and the health of others. At sentencing, defendant requested that the interviewer's statement be stricken. The trial court ruled that the statement did not affect her sentence and denied defendant's request. The trial court's decision to disregard the statement was effectively a determination that it was irrelevant. See *id.* Therefore, defendant was entitled to have the information stricken. See *id.* However, the failure to strike the information was

harmless. See *id.* The trial court indicated that it was not taking this statement into account in sentencing defendant. Therefore, the trial court did not abuse its discretion. See *id.* at 689.

Defendant also argues that the PSIR still contains information regarding defendant being under investigation for murder for hire that the trial court ruled should be corrected. At sentencing, defendant objected to information in the PSIR that he was under investigation for murder for hire. The prosecution agreed that the PSIR should be changed to indicate that defendant was under investigation, but is no longer. The trial court ruled that it should be changed to indicate that he was not presently under investigation and that no charges were brought. The version of the PSIR available to this Court indicates that “defendant was under investigation” and “there has not been any warrant authorized.” Although the language differs slightly from the trial court’s ruling, it appears that the PSIR was corrected in conformity with the trial court’s ruling and need not be amended.

Finally, defendant claims the trial court ruled that a statement made by defendant should be stricken, but it remains in the report. At sentencing, defendant requested that an alleged statement made by him be stricken. The trial court ruled that the fact that defendant disputed making the statements to the probation department should be added to the PSIR. The version of the PSIR available to this Court does not indicate that defendant disputed making the statement. Thus, the case is remanded for correction of the PSIR in conformity with the trial court’s ruling and the corrected version shall be sent to the Department of Corrections. See *id.*; MCL 771.14(6).

VII. OFFENSE VARIABLE 13

Finally, defendant contends that the trial court abused its discretion in scoring offense variable (OV) 13 at 25 points because he was only convicted of two counts of CSC III in this case and was not convicted of any crime in Wayne County. We disagree.

Under the sentencing guidelines, the circuit court’s factual determinations are reviewed for clear error and must be supported by a preponderance of the evidence. Whether the facts, as found, are adequate to satisfy the scoring conditions prescribed by statute, i.e., the application of the facts to the law, is a question of statutory interpretation, which an appellate court reviews *de novo*. [*People v Hardy*, __ Mich __ ; __ NW2d __ (Docket Nos. 144327 & 144979; issued July 29, 2013), slip op at 6-7 (footnotes with citations omitted).]

Under MCL 777.43(1)(c), 25 points are given if “[t]he offense was part of a pattern of felonious criminal activity involving 3 or more crimes against a person.” MCL 777.43(2)(a) provides that “all crimes within a 5-year period, including the sentencing offense, shall be counted regardless of whether the offense resulted in a conviction.” Defendant was convicted of two counts of CSC III in this case. CSC III is a crime against a person. MCL 777.16y. NB also testified about an incident in Wayne County in which defendant sexually assaulted her and which constituted CSC III. Although defendant was not convicted, the crime can be counted regardless of whether it resulted in a conviction. MCL 777.43(2)(a). Defendant suggests that because NB

never appeared at the trial in Wayne County and the case was dismissed, it should not be counted. However MCL 777.43 does not require that a defendant be charged, tried, or convicted of the crimes. Accordingly, the trial court properly scored OV 13 at 25 points.

Affirmed as to defendant's convictions as sentences, but remanded to the trial court to correct the PSIR and to send the corrected PSIR to the Department of Corrections. We do not retain jurisdiction.

/s/ Jane M. Beckering
/s/ Peter D. O'Connell
/s/ Douglas B. Shapiro